No. 18673

In the

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
Appellant,

vs.

MILDRED LUNDSTROM,
Appellee.

BRIEF OF APPELLEE

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JURISDICTION

Appellee agrees with the jurisdictional statement in Appellant's brief.

STATEMENT OF THE CASE

In June of 1961, Mrs. Lundstrom, the appellee, was recuperating from a broken hip and had visited her son in Japan for a month. She traveled to Japan by air, but chose to return by appellant's steamship, the PRESIDENT HOOVER, in an attempt to advance her recuperation and obtain more relaxation (Tr 20). It is agreed that she was a paying passenger at the time of her injury (Tr 6-7, R2).

The pertinent evidence in this case can be grouped into three categories:

(1) Appellee had severe physical handicaps at the time she boarded appellant's ship.

Mrs. Lundstrom is a 59-year-old women who was severely handicapped prior to the accident in question by two separate conditions, first, an arthritic condition that left disabled a great many joints in her body. It had afflicted both arms and hands, rendering them, in the words of the trial judge, "more or less like claws, so that the jury could well believe that her hands were to

a greater or lesser extent useless to her . . ." (Tr 24-26, 132). She was unable to straighten her left arm (Tr 26), could only touch handrails, and could not hold them with a secure grip (Tr 16-17), and, in fact, was unable to grasp or properly hold crutches because of this claw-like condition of her hands (Tr 28). Her fingers were so useless to her that she was even unable to open the drawers in her cabin to place her clothes (Tr 38). In addition, her toes were stiff, like her fingers, and caused pain with every step (Tr 31-32).

The second prior disabling condition was a hip fracture, suffered in 1960, requiring her to be hospitalized for 149 days (Tr 10, 20, 28). This injury left her with a pronounced limp (Tr 16, 30) and forced her to negotiate stairs by advancing her right foot and then bringing her left foot even with it, proceeding in this slow and clumsy fashion, step by step (Tr 30-31, 36).

(2) Responsible officers aboard appellant's ship were given actual notice of appellee's physical handicap.

At the time Mrs. Lundstrom boarded the PRESIDENT HOOVER in Yokohama, the ship's personnel was completely apprised of her disabilities, handicaps, limitations and general condition. Mrs. Lundstrom's son spoke specifically with the ship's purser, whom he could identify by name (Tr 9), the assistant purser (Tr 9)

and the chief steward, also identified by name (Tr 12-13). These officers were informed generally about her arthritic condition in her hands and her feet and that she was quite handicapped. They were also informed of the fracture in her right hip (Tr 10). Specifically, they were told that "It is very unstable for her to get around, as far as *climbing stairs* or even walking in general." (Tr 10) (Emphasis ours). Appellee's son further informed the officers specifically that his mother was handicapped in getting dressed, handling her clothing, trying to go to the bathroom, and getting out of chairs (Tr 10-12).

Mrs. Lundstrom, herself, told the "ticket taker" on boarding that she had been recuperating from a broken hip and needed assistance in dressing for dinner (Tr 33-34). Slightly later, on the same day, she told the ship's nurse she had difficulty *in going up and down stairs* (Tr 52).

As a result of these discussions, and thus the notice given to appellant, Mrs. Lundstrom's son was assurred by the purser that he, the purser, would take care of Mrs. Lundstrom, that this was his job, and that everything would be all right (Tr 11). The steward also assurred Mrs. Lundstrom's son that everything within his power to help appellee would be done (Tr 13). In fact, subsequently, a stewardess was furnished by the

ship who helped Mrs. Lundstrom dress, and a room steward was called to open her dresser drawers (Tr 36-38). After meals, a steward would assist Mrs. Lundstrom in arising from her chair (Tr 36).

(3) Appellant took no action to protect appellee from injury during a fire and boat drill, despite its knowledge of her disabled condition.

In the early morning of July 16, 1961, the ship sailed from Yokohama (Tr 37-38). On Monday, July 17, 1961, Mrs. Lundstrom received a copy of the ship's newspaper, "Presslines", which contained a notice of a fire and boat drill to be held that day. This was the first and only information Mrs. Lundstrom received concerning such a drill (Tr 39). No one told her that she need not attend (Tr 40), or even that she need not attend if not in physical condition to do so (Tr 41); no one showed her how to get into her life jacket (Tr 41); in fact, no person on the ship told her *anything* about the drill (Tr 41). So, the only information Mrs. Lundstrom received was the command in the notice that "all passengers are required to attend these drills, wearing their life jackets * * *" (Tr 40-41).

Mrs. Lundstrom heard the alarm bell and attempted to put on her jacket, but could not properly fasten it because of her crippled fingers. To some extent, she was helped in this by another passenger (Tr 42-44).

In attempting to climb the stairs, she had difficulty seeing the floor over the protruding life jacket (Tr 45-46, 48). The excitement and the rush occasioned by the fire drill, as Mrs. Lundstrom attempted to negotiate the stairs, can best be described in her own words, "When we got to the stairway, I had ahold of the railing, and I kept as close to the railing as I could, and went up the steps one at a time. Mrs. Wells was right behind me, and all these other people kept rushing by and saying "Excuse me," and I got so nervous and I was trying to hurry so fast so I wouldn't be late because I knew that I was pokey. And that was when I got to the top, and I knew that — I thought I was on that top step. Instead of that, I just * * *" (Tr 46-7). As she progressed up the stairs no one told her where to go (Tr 47). Even though there were about thirty people milling around at the top of the stairs, there was no ship's officer present to tell them what to do (Tr 47).

When appellee fell, she was removed to her stateroom and then attended by the ship's doctor and nurse until the vessel reached Hawaii. During this time, she suffered great pain, inconvenience and humiliation, and, without dispute, her injuries were of a very serious and permanent character (Tr 67-69, 74, 61-64).

The case was tried to a jury which returned a verdict for the appellee. Appellant's motion for a directed ver-

dict and for judgment n.o.v. were both denied, and such denial is the subject of this appeal (R 8-13).

ARGUMENT

In view of the jury verdict for appellee, the evidence must be examined in a light most favorable to her. There was substantial evidence to show that Mrs. Lundstrom was disabled; that the ship had actual knowledge of such disability; that the ship did not exercise the high degree of care required by law, when it failed to excuse her from the fire drill or protect and assist her if she was to participate in the fire drill. As a result, she fell and received permanent injuries.

APPELLEE'S ANSWER TO POINT ONE

There was substantial, uncontradicted, evidence that Mrs. Lundstrom was disabled. Our statement of facts has set forth in detail the extent of this disability, which was established by the jury verdict. In addition to the oral testimony, the jury had the opportunity to see Mrs. Lundstrom's hands, watch her walk, observe the manner in which she was able to hang onto a railing (Tr 49) and climb up and down steps into the witness box. The appellant called no witnesses to contradict her as to any part of her testimony or to challenge her doctor's opinion. This lack of contradiction was also undoubtedly weighed by the jury.

Appellant asserts that she was "taking part in the ship's activities for two whole days without any difficulty and without any hint or suggestion that she could not participate in the drill * * *" (Br 11); emphasizes her ability to get up and down stairs (Br 3), and, in general, attempts to create the impression that Mrs. Lundstrom flitted about the vessel like a high-spirited college girl. There is no evidence to support such statements, such as she "partook freely of the ship's activities for two full days * * * using all the stairways" (Br 10), and had been "moving about the ship freely and with no trouble at all * * *" (Br 3), but even if there were, the jury would still be permitted to find that Mrs. Lundstrom suffered from a severe disability.

The only stairway used by Mrs. Lundstrom was that going to and from the dining room and one one occasion, that leading to the ship's library (Tr 86). While using these stairs, she was not required to wear a life jacket; people were not rushing by her; there were not thirty people milling about at the top of the stairway, and there was no bell clanging driving her forward at the fastest possible pace (Tr 107-108). Certainly, if appellant furnished assistance to her to get dressed and even to open her bureau drawers, this, along with the actual notice of her general condition, would constitute more than a "hint or suggestion that she could not

participate in the drill" (Br 11). Her physical handicap cannot be denied.

It is admitted by appellant (Br 11) and it is the uniform law, that the ship-owner owes a high degree of care to every passenger for hire, whether physically disabled or not. This Court has held that such a carrier owes a duty of exercising "extraordinary vigilance and the highest skill to secure the safe conveyance of the passengers," *Allen v. Matson Navigation Co.*, 255 F2d 273 (CA 9, 1958), at 277. When a physical disability of a passenger is known to the carrier, it must exercise a higher degree of care for the safety of that person as the infirmity requires. On this latter proposition, there seems to be a paucity of cases in the maritime field. However, there are numerous cases involving landside carriers, who have the same duty to their passengers as have ships toward theirs. As stated in Gilmore and Black, The Law of Admiralty, page 22,

> "The subject of liability to passengers for injury may be summarily handled here, as the principles involved differ little from those in use ashore. * * *"

The landmark case is *Croom v. Chicago, M. & St. P. Ry. Co.*, 52 Minn. 296, 53 NW 1128 (1893). There, the defendant carrier accepted an eighty-year-old feeble and infirm person as a passenger. He required special care. It was necessary for him to change cars at 4 A.M.,

but no one assisted him in making this change. While carrying his own luggage, he was the last to get off the first car and had to go up steps to board the second car. He negotiated the steps to the loading platform, but fell off the other side near another track. The court, in that case, laid down the rule that has been frequently followed by other courts, when it said:

> "If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself, he ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity."

A recent case from California, *McBride v. Atchison, Topeka & Santa Fe Railway Co.*, 44 Cal 2d 113, 279 P2d 966, (1955) quotes with approval the above language from the *Croom* case. Plaintiff was using crutches because of a previous knee operation and fell on a cigar butt when alighting from defendant's coach. A judgment of nonsuit was reversed. The court held that the

carrier, when it knows a passenger to be abnormal, either physically or mentally, is bound to give such higher degree of care for his safety as his infirmity requires, and the failure to do so is negligence.

Turner v. Wabash Ry. Co. (Missouri, 1919), 211 SW 101, involved a seventy-two-year-old passenger paralyzed on the left side, so that he had no control over the use of his left leg and could see only straight ahead with his left eye. He was compelled to walk with a cane and had been assisted up the steps of the train car when boarding by some of defendant's employees. When plaintiff attempted to depart, he handed his baggage out of the car window to another person not connected with the defendant and then waited for someone to come and help him from the car. No one came, and plaintiff eventually decided to attempt to depart by himself. In trying to alight, he fell and broke his hip. A verdict for the plaintiff was sustained by the appellate court. The factual situation of this case is very similar to the case at bar.

In *Holmes v. Atlantic Coast Line R. Co.*, 181 NC 497, 106 SE 567 (1921), plaintiff was old and feeble and required assistance in alighting at least, her son had so notified the conductor, just as did Mrs. Lundstrom's son notify the ship's personnel. The conductor refused to assist her and stood by watching while she slid down

the steps to the ground. Because of this manner of departure, plaintiff was injured, brought suit and was allowed compensatory as well as punitive damages. This was affirmed by the appellate court.

Talbert v. Charleston & W. C. Ry. Co., 75 SC 136, 55 SE 138 (1906), involved a passenger who had only one hand. He purchased a ticket from the conductor, who testified he did not notice the plaintiff's infirmity. Plaintiff was injured and thrown to the ground while attempting to board defendant's train. In affirming the verdict for the plaintiff, the court held that not only the duty of exercising a high degree of care had been violated, but the conductor also had a duty to notice, and not disregard, the condition of the plaintiff.

There has been a somewhat similar case in the State of Oregon, *Watts v. Spokane, Portland & Seattle Ry. Co.*, 88 Or 192, 171 P 901. The plaintiff in this case was seventy-four years of age and was riding the defendant's train from Rainier to Goble. He was infirm and weak, which was or should have been obvious and visible to the defendant. When the train stopped, defendant's employee assisted a woman with a baby in alighting and then threw the stool up on the platform and signalled the train to go ahead. In attempting to

depart by himself, plaintiff fell, although it is not clear exactly why. A verdict against the railroad was sustained, although that against the conductor was reversed. The court held the rule to be:

> "The rule with respect to the duty owing persons of advanced age or under disability is that they should be given such assistance as their appearance reasonably indicates is necessary; and the train employee is bound to consider only such facts with respect to the passenger's condition as are within his knowledge, or are made known to him through the passenger's appearance, or otherwise."

Such law seems best summarized in the case of *Southern Pacific Co. v. Buntin*, 54 Ariz 180, 94 P2d 639, 124 ALR 1422 (1939).

> "If the carrier knows the passenger to be abnormal, either physically or mentally, it is then bound to give such higher degree of care for the safety of that person as his infirmity requires, and the failure to do so is negligence, even if the conduct of the carrier would not be negligence toward the normal person."

We think the defendant was guilty of ordinary negligence here — failure to do what a reasonable person would do under the circumstances. Certainly, it was

guilty of failing to exercise the high care required of a common carrier, particularly with the knowledge of this person's physical disability. Is it making an "insurer" of appellant to ask that the ship's officers notify passengers with physical impairments that they need not attend the fire drill, that they should remain in their cabin? Is it too much to ask the ship's officers to furnish an escort for a known disabled person, and to tell such person she need not wear a life jacket while manipulating her way up the steps through the rushing crowd, or even merely to warn such person of what a fire and boat drill entails so that she could intelligently decide whether she should, or could, attend? If the ship were sinking, would not the officers be required to send special assistance to one like Mrs. Lundstrom to see that she reached a life boat in safety?

Further decisions on a related subject can be found in 17 ALR2d 1085. This annotation discusses the duty and liability of a carrier to an intoxicated person. Without unduly lengthening this brief, we can safely say it is universally held that intoxication is a disability, and the carrier must exercise the degree of care necessary rotect such a known intoxicated person. Certainly, person under intoxication should get no greater pro-

tection from our courts than would a person who had been previously crippled, as had Mrs. Lundstrom.

Appellant makes much of the claim that the fire drill itself, the life jacket and other conditions aboard the ship were in conformity with Coast Guard regulations (Br 6-7-8). We think this is completely immaterial. In the first place, we do not claim that Mrs. Lundstrom was injured because appellant neglected to follow Coast Guard regulations. Plaintiff's exhibit 7 reads as follows:

> "Section 78.17.50 (b) (5) says:
>
> " 'The passengers shall be *encouraged* to fully participate in these drills and shall be instructed in the use of the life preservers.' " (Emphasis ours)

Thus, between the ship and the Coast Guard, passengers are not *required* to participate, but are only encouraged. This, of course, is only common sense. If a passenger had a serious cardiac condition which would be adversely affected by climbing stairs, we know that he would be properly excused from participating.

However, the only notice to Mrs. Lundstrom was contained in the daily newspaper, stating that she was

"required" to attend these drills (Pl Ex 3, Tr 39-40). The word very plainly meant to her, as it meant to the jury, that she was obliged to attend the drill. On page eight of appellant's brief it is admitted that a passenger with a reason could be excused. In the exercise of the highest degree of care, the appellant was obliged to so inform Mrs. Lundstrom.

Thus, the court was correct in submitting to the jury the question of whether the American President Line exercised this high degree of care required by law when it (1) failed to advise a person whom it knew to be disabled of the activities of a fire drill, (2) failed to advise such person that she need not don a life jacket, (3) failed to provide assistance to such disabled person in going up steps in the excitement of a drill when other people were rushing past and thirty more people were milling about at the head of the steps, and (4) failed to advise such person that she could be excused from the drill.

APPELLEE'S ANSWER TO POINT TWO

Appellant claims that because of some answers given on cross-examination by appellee, to the effect that she fell because she could not see over the life jacket to the top step, the ship should be excused from

liability. Appellant asserts that the ship's officers had no notice of such inability and that therefore it should not be responsible. This contention is erroneous for four reasons.

First, appellant had specific notice of Mrs. Lundstrom's inability to safely move and climb steps (Tr 10, 52). Moreover, the jury observed her impaired movements while encased in a life jacket, and it could determine that she could not see over the life jacket. Appellant knew, or in the exercise of even due care should have known, that Mrs. Lundstrom's physical condition, her size, and the size of the life jacket made it unsafe for her to attempt to navigate a crowded stairway during a fire drill.

Second, appellee's testimony that she was unable to see the top step was not confined only to the wearing of the life jacket. The hazard to her involved not only the life jacket, but also her being required to go up the stairs one at a time, with the left foot always preceding the right, people rushing by her on the stairway and her natural reaction to hurry, and about thirty people milling about at the top of the stair.

Third, appellant is further in error when it asserts that Mrs. Lundstrom's testimony amounts to a binding admission against interest as to the legal cause of the

injury. The trial court held that her comments were, at most, expressions of opinion and not statements of fact (Tr 132-4). It has been held that such opinions by a non-expert as to the "cause" of an event invades the province of the jury as the triers of fact, and are therefore inadmissable. Hence they cannot be binding. At the very most, Mrs. Lundstrom's remarks—partial answers given on cross examination—could be viewed by the jury in the light of all the other testimony of appellant's negligence. *Mikulich v. Carner*, 69 Nev 50, 240 P2d 873, 38 ALR2d 1 (1952); Annotations in 38 ALR2d 13 and 169 ALR 803-813; 20 Am Jur., 1963 Supp 204, Evidence, sec. 1181; *Reynolds v. Sullivan*, 330 Mass 549, 116 NE2d 128 (1953).

Fourth, the logical weakness of appellant's argument should be apparent. Mrs. Lundstrom has charged the ship with negligence in failing to take adequate care of her and to protect her during the fire and boat drill. The jury found this to be true, but there must have been an immediate cause of the injury. If Mrs. Lundstrom had not tripped, she might have been knocked down by another passenger rushing by on the stairway, or she might have been injured in some other manner. Yet the underlying legal cause of her injury would still be the failure of the ship to protect her, as claimed in her contentions. Appellant would try to cast the case in

the same light as a conventional "slip and fall" claim but this is not the theory of appellee. Therefore, argument that the life jacket, stairway or handrail were in good repair is wholly beside the point.

Appellant also contends in passing that Mrs. Lundstrom was able to, and did, use her hands to grip the rail of the stairway (Br 15-16). There is ample evidence hereinabove cited that she had practically no function of her hands. She could not even pull open dresser bureau drawers and had to have the room steward's assistance for this simple act. So when Mrs. Lundstrom testified that she hung onto the rail, the jury having seen her and heard all of the other testimony could assess how tight a grip she could achieve. Further the jury might well have taken into account appellant's own contention in the pre-trial order (R 4) that Mrs. Lundstrom was "negligent" in not "holding firmly to the hand rail."

Like appellant's first point, these issues are all questions of fact which were vigorously argued and submitted to the jury under eminently fair instructions to which appellant took no exception.

CONCLUSION

In our system of trial by jury, it is up to the jury to determine whether specific conduct, or lack of it, con

stitutes a breach of the required standard of care, as well as to decide issues of fact. Here appellant tried its case without calling so much as a single witness. The issues were put to the jury by an experienced and fair judge under instructions so obviously correct that even appellant had no exception. As we have shown, there was ample evidence to support each element of appellee's case: disability, notice, failure to extend protection and resulting injury. The judgment should be affirmed.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for The Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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